No. 14-1209

# In The Supreme Court of the United States

JOHN STURGEON,

*Petitioner,*

v.

SUE MASICA, IN HER OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, *et al.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF ARCTIC SLOPE REGIONAL CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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# TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | iii |
| INTERESTS OF THE *AMICUS CURIAE* | 1 |
| REASONS FOR GRANTING THE PETITION | 2 |
| I. The Ninth Circuit's Unprecedented Reading of ANILCA Section 103(c) Extends Federal Regulatory Authority Over Millions of Acres of Native Corporation Lands | 4 |
| A. Land Ownership in Alaska | 4 |
| B. ASRC's Lands | 8 |
| II. This Case Presents an Important Federal Question Affecting ASRC and its Shareholders, Other Native Corporations, and the State of Alaska | 13 |
| A. Enforcement of CSU regulations on ANCSA Corporation inholdings will dramatically impact economic development and day-to-day life on Native Corporation lands | 13 |
| B. Section 103(c) of ANILCA confirms that federal regulatory authority does not reach private and State land inholdings surrounded by federal conservation units | 16 |
| C. No constitutional basis exists for the broad regulatory power the Ninth Circuit found in section 103(c) of ANILCA | 20 |
| CONCLUSION | 25 |

TABLE OF CONTENTS – Continued

Page

APPENDIX

Department of the Interior – Alaska Land Status Map ..... App. 1

# TABLE OF AUTHORITIES

Page

CASES

*Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995).....22

*City of Angoon v. Marsh*, 749 F.2d 1413 (9th Cir. 1984).....17, 18

*City of Saint Paul v. Evans*, 344 F.3d 1029 (9th Cir. 2003).....6

*Clark v. Martinez*, 543 U.S. 371 (2005).....4, 20

*Free Enter. Canoe Renters Ass'n of Mo. v. Watt*, 711 F.2d 852 (8th Cir. 1983).....21

*Kansas v. Colorado*, 206 U.S. 46 (1907).....21

*Kleppe v. New Mexico*, 426 U.S. 529 (1976).....4, 21

*Nevada v. Watkins*, 914 F.2d 1545 (9th Cir. 1990).....21

*New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982).....22

*Sturgeon v. Masica*, 768 F.3d 1066 (9th Cir. 2014).....22

*Trs. for Alaska v. State*, 736 P.2d 324 (Alaska 1987).....5

*United States v. Lindsey*, 595 F.2d 5 (9th Cir. 1979).....21

*United States v. Santos*, 553 U.S. 507 (2008).....20, 23

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

Property Clause, U.S. Const. art. IV, § 3, cl. 2 ....20, 21

Commerce Clause, U.S. Const. art. I, § 8, cl. 3....20, 23

STATUTES

Alaska Native Claims Settlement Act of 1971 ("ANCSA"), Pub. L. No. 92-203, 85 Stat. 688 (codified at 43 U.S.C. § 1601, *et seq.*) .....*passim*

ANCSA § 2(a), 43 U.S.C. § 1601(a) .....6

ANCSA § 7, 43 U.S.C. § 1606 .....6, 8

ANCSA § 8, 43 U.S.C. § 1607 .....6

ANCSA § 12, 43 U.S.C. § 1611 .....6

ANCSA § 14, 43 U.S.C. § 1613 .....6

ANCSA § 22(g), 43 U.S.C. § 1621(g) .....9

Alaska National Interest Lands Conservation Act of 1980 ("ANILCA"), Pub. L. No. 96-487, 94 Stat. 2371 (codified at 16 U.S.C. § 3101, *et seq.*).....*passim*

ANILCA § 102(3), 16 U.S.C. § 3102(3).....18

ANILCA § 103(c), 16 U.S.C. § 3103(c) .....*passim*

ANILCA § 303(2), 94 Stat. 2371, 2390.....9

ANILCA § 1002, 16 U.S.C. § 3142 .....9

ANILCA § 1003, 16 U.S.C. § 3143 .....9

TABLE OF AUTHORITIES – Continued

Page

Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958), *reprinted in* 48 U.S.C. ch. 2, refs. & annots., as amended .....5

OTHER AUTHORITIES

S. Rep. No. 96-413, at 303 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5070.....19

36 C.F.R. § 1.4(a).....14

36 C.F.R. § 2.1.....14

36 C.F.R. § 2.2.....14

36 C.F.R. § 2.3.....14

36 C.F.R. § 2.5.....14

36 C.F.R. § 2.10.....14, 15

36 C.F.R. § 2.13.....21

36 C.F.R. § 2.17.....14

36 C.F.R. § 2.18.....14

36 C.F.R. § 2.50.....14

36 C.F.R. § 2.51.....14

36 C.F.R. § 2.52.....14

36 C.F.R. § 3.8.....14

36 C.F.R. § 4.10.....14

36 C.F.R. § 4.30.....14

36 C.F.R. § 5.3.....14

36 C.F.R. § 5.7.....14

TABLE OF AUTHORITIES – Continued

Page

36 C.F.R. § 13.25 ..... 15

36 C.F.R. § 13.160 ..... 14

36 C.F.R. § 13.410 ..... 14

## INTERESTS OF THE *AMICUS CURIAE*

Arctic Slope Regional Corporation ("ASRC") submits this brief as *amicus curiae* in support of John Sturgeon's petition for a writ of certiorari in *Sturgeon v. Masica* (No. 14-1209).[1] ASRC is one of twelve private, for-profit Alaska Native Regional Corporations formed in 1971 under the Alaska Native Claims Settlement Act of 1971 ("ANCSA"), Pub. L. No. 92-203, 85 Stat. 688 (codified at 43 U.S.C. § 1601, *et seq.*). Alaska's largest locally owned business, ASRC is owned by 12,000 Iñupiat Eskimo shareholders. ASRC and its subsidiaries operate in thirty-six states and internationally, employing more than 10,000 people and generating over $2.5 billion in annual revenue.

ASRC holds title to nearly five million acres of land on Alaska's North Slope granted to it pursuant to ANCSA. More than 380,000 of these acres are "inholdings" situated within the Gates of the Arctic National Park, the Alaska Maritime National Wildlife Refuge, and the Arctic National Wildlife Refuge. All of these are federal conservation system units ("CSUs") created or expanded by the Alaska National Interest Lands Conservation Act of 1980 ("ANILCA"), Pub. L.

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[1] In accord with Supreme Court Rule 37.6, ASRC affirms that no counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received timely notice of ASRC's intention to file this brief, and consent to file was granted by all parties. Letters reflecting the parties' consent to the filing of this brief have been filed with the Clerk.

No. 96-487, 94 Stat. 2371 (codified at 16 U.S.C. § 3101, *et seq.*). ASRC's lands, including its inholdings within federal CSU's, have high potential for oil and gas development, other mineral development, tourism, and other economic uses. These acres are also critically important to ASRC's shareholder communities for village use and subsistence fishing and hunting. Many ASRC shareholders reside in two villages located on its inholdings within CSUs.

Through ANILCA, Congress balanced the conservation interests of the federal government with the economic development and subsistence interests of ANCSA corporations like ASRC. The Ninth Circuit expanded federal regulatory authority over Native Corporations' lands through a contorted misreading of the very provision in ANILCA meant to limit that authority. This ruling dramatically upsets the balance Congress struck in ANILCA, undermining the purpose of ANCSA to the great detriment of ASRC's shareholders and those of its fellow Native corporations.[2]

## REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision reaches far beyond one hunter and one hovercraft on navigable waters

[2] Other Native corporations and the State of Alaska have also filed as *amici* in support of Mr. Sturgeon's petition. ASRC fully agrees with the arguments put forth by its fellow *amici*.

of the State. Its reading of ANILCA section 103(c), 16 U.S.C. § 3103(c), affects private land ownership rights on millions of acres in Alaska. Most importantly to *amicus*, the Ninth Circuit's ruling threatens the economic development and subsistence rights of thousands of Alaska Native Corporation shareholders on their privately-held ANCSA lands within ANILCA-created federal conservation system units.

The Ninth Circuit found in section 103(c) of ANILCA a new source of far-reaching federal regulatory authority over State and private lands. But section 103(c) is not a grant of federal regulatory authority. In order to protect the economic and use value of private and State lands, the statutory provision plainly limits that authority to "public lands" of the United States. Congress added the provision to reassure the State of Alaska and the Alaska Native Corporations that their lands, which became inholdings upon the passage of ANILCA, would be free of federal CSU regulations. The Ninth Circuit's ruling invalidates that provision, granting the federal government power to effectively appropriate into the federal park system private lands granted to ANCSA corporations for economic purposes.

Section 103(c)'s meaning has not been, but should be, settled by this Court because of the dramatic negative impact the Ninth Circuit's decision will have on economic development, subsistence and transportation uses, and, with respect to State lands, the sovereign rights of Alaska's people over their land. Absent this Court's ruling, no court other than the

Ninth Circuit will ever answer this Alaska-specific statutory question. Certiorari should be granted for the additional reason that no constitutional source exists for the plenary regulatory authority the Ninth Circuit discovered in section 103(c). That court's reading therefore conflicts with relevant decisions of this Court, including *Kleppe v. New Mexico*, 426 U.S. 529 (1976) and *Clark v. Martinez*, 543 U.S. 371 (2005), among others. The Ninth Circuit's contorted reading leads to extensive unconstitutional results; the plain meaning of the statute – which the Ninth Circuit ignored – raises no such constitutional concerns.

## I. The Ninth Circuit's Unprecedented Reading of ANILCA Section 103(c) Extends Federal Regulatory Authority Over Millions of Acres of Native Corporation Lands.

The Ninth Circuit held that under section 103(c) of ANILCA, federal CSU regulations of nationwide applicability extend to State and privately owned inholdings in Alaska's national parks and refuges. Eighteen million acres of land conveyed to Alaska Native Corporations under ANCSA are profoundly affected by this ruling.

### A. Land Ownership in Alaska

Alaska's primary resource is its land. At 365.5 million acres, Alaska is more than twice as large as Texas. This vast terrain serves numerous local and national interests and goals, including economic

development, energy security, environmental conservation, and subsistence use. In service of these goals, Congress has divided Alaska among three primary landowners: the federal government, the State itself, and the Alaska Native Corporations. These three together hold over 99 percent of the land in Alaska. Less than one percent of the state is held in traditional private ownership.[3]

The State of Alaska itself is its own second-largest landowner, behind the federal government. The Alaska Statehood Act granted the new state ownership of twenty-eight percent of its total area in order to "ensure the economic and social well-being of the new state."[4] Land owned by the State of Alaska approximates the State of California in size.[5]

The Alaska Statehood Act reserved the issue of aboriginal land claimed by Alaska's indigenous people. Congress passed the Alaska Native Claims

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[3] The map at App. 1, prepared by the Department of the Interior, shows the State, Native Corporation, and different categories of federal government lands in Alaska. This map is also available at http://www.asrc.com/lands/Pages/alaska%20maps.aspx.

[4] Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958), *reprinted in* 48 U.S.C. ch. 2, refs. & annots., as amended; *Trs. for Alaska v. State*, 736 P.2d 324, 335 (Alaska 1987) (explaining that Congress's debates show it "recognized the financial burden awaiting the new state" and that "the large statehood land grant and the grant of the underlying mineral estate were seen as important means by which the new state could meet that burden.").

[5] The Appendix map shows State lands in dark blue.

Settlement Act ("ANCSA") in 1971 to address the "need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims." ANCSA § 2(a), 43 U.S.C. § 1601(a). ANCSA created twelve regional corporations and more than 200 village corporations, and made Alaska's Native people shareholders in those corporations. ANCSA §§ 7-8, 43 U.S.C. §§ 1606-1607. ASRC is the Alaska Native Regional Corporation for Alaska's North Slope region.

ANCSA called for conveyance of approximately 44 million acres of federal land to Alaska Native regional and village corporations, making the Native Corporations, as a group, the third-largest landowner in the State. *See* ANCSA §§ 12, 14, 43 U.S.C. §§ 1611, 1613.[6] Congress intended the Native Corporations to use their ANCSA lands largely for economic development benefiting the Native people of Alaska. *See* ANCSA § 8, 43 U.S.C. § 1607; *City of Saint Paul v. Evans*, 344 F.3d 1029, 1031 (9th Cir. 2003).

Even after transferring these extensive lands to the State and to Native Corporations, the federal government remains the largest landowner in Alaska. The federal government's share is 222 million acres, over sixty percent of the land in the state. Federal acreage in Alaska is larger than Texas and Oklahoma together. It covers more territory than Maine, New

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[6] The Native Corporations' lands are shown on the Appendix map in brown.

Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Ohio, Delaware, Maryland, Virginia, North Carolina, and South Carolina combined. The regulatory influence of the federal government and its relationship to other Alaska landowners thus has extraordinary importance in the state.

Over 120 million of Alaska's federally owned acres are protected within federal conservation system units, or CSUs. These include 15 national parks, preserves, and monuments managed by the National Park Service and 16 national wildlife refuges managed by the United States Fish and Wildlife Service.[7] Most of these CSUs were created or expanded by ANILCA in 1980. By that time, however, the Native Corporations had received most of the lands promised to them under ANCSA to ensure their economic security. Many of these previously conveyed lands fell within the boundaries of the newly created CSUs. At least several hundred private homestead sites were also engulfed by federal conservation lands under ANILCA.[8] ANILCA-created federal conservation units

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[7] The various categories of federal government lands are shown in different colors on the Appendix map. Lands managed by the National Park Service are light pink; lands in the National Wildlife Refuge System (managed by the United States Fish and Wildlife Service) are light blue.

[8] These private landowners are unlikely to muster the resources to make themselves heard in this Court, but their interests are markedly affected by the Ninth Circuit's ruling as well.

ultimately engulfed over eighteen million acres of ANCSA Corporation-owned land – vast islands of private land within CSUs. Eleven of Alaska's twelve regional corporations and many of its over 200 village corporations own inholdings within ANILCA CSUs. These eighteen million acres of ANCSA inholdings – over forty percent of all ANCSA lands – are now potentially subject to federal CSU regulations under the Ninth Circuit's decision.

### B. ASRC's Lands

ASRC owns five million acres of ANCSA land in the northernmost part of the state, known as the "North Slope" of the Brooks Mountain Range. Its shareholders live primarily in eight extremely remote arctic villages in one of the most isolated and challenging environments in the world. In this harsh and roadless region, they continue to rely on the same subsistence food sources as their ancestors. The health of caribou herds, fish, water fowl, Dall sheep, musk oxen, marine mammals, and other subsistence food populations are critically important to ASRC's people. ASRC's land is located around its villages, in key locations for subsistence hunting and fishing, and in sites with high potential for oil, gas, and other development of subsurface resources. The land wealth held by ASRC benefits not only its own shareholders, but Alaska Native people statewide through the revenue sharing provisions of ANCSA. ANCSA § 7(i)-(j), 43 U.S.C. § 1606(i)-(j).

ASRC's land holdings intersect with three federal CSUs. Gates of the Arctic National Park, which itself covers an area larger than Massachusetts, surrounds the Iñupiat village of Anaktuvuk Pass. ASRC owns almost 180,000 acres of land within Gates of the Arctic, including lands around the village itself as well as a separate parcel at Itkillik Lake. ASRC's inholdings within Gates of the Arctic are four times the size of the District of Columbia and over twice the size of Utah's Arches National Park. These inholdings have value for tourism and natural gas development, in addition to their critical subsistence hunting and fishing uses.

Kaktovik, another ASRC village, is located on the coastal plain within the Arctic National Wildlife Refuge ("ANWR"). At nearly two million acres, ANWR is twice as large as Maryland and Delaware combined. ASRC owns more than 100,000 acres of inholdings in ANWR, primarily around the coastal village of Kaktovik but also at Elusive Lake. Elusive Lake has potential for development as a tourism fishing lodge. The lands surrounding Kaktovik are used for village and subsistence purposes and have economic potential for oil and gas development.[9]

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[9] As a former wildlife range predating ANILCA, ANWR is a special case under both ANCSA and ANILCA. *See, e.g.*, ANCSA § 22(g), 43 U.S.C. § 1621(g); ANILCA § 303(2), 94 Stat. 2371, 2390. Oil and gas development on these lands will require Congressional action. *See* ANILCA §§ 1002-1003, 16 U.S.C. §§ 3142-3143. Section 103(c) is therefore a single piece of a more complicated statutory

(Continued on following page)

The Alaska Maritime National Wildlife Refuge ("AMNWR") covers over two thousand islands, headlands, and other coastal features around Alaska's vast coastline. The two northernmost units of the refuge are located at Cape Thompson and Cape Lisburne, on the Chukchi Sea coast near the village of Point Hope. ASRC holds over 100,000 acres of inholdings in these two AMNWR units. Point Hope residents use these lands for subsistence, and they also have coal and other mineral resource potential.

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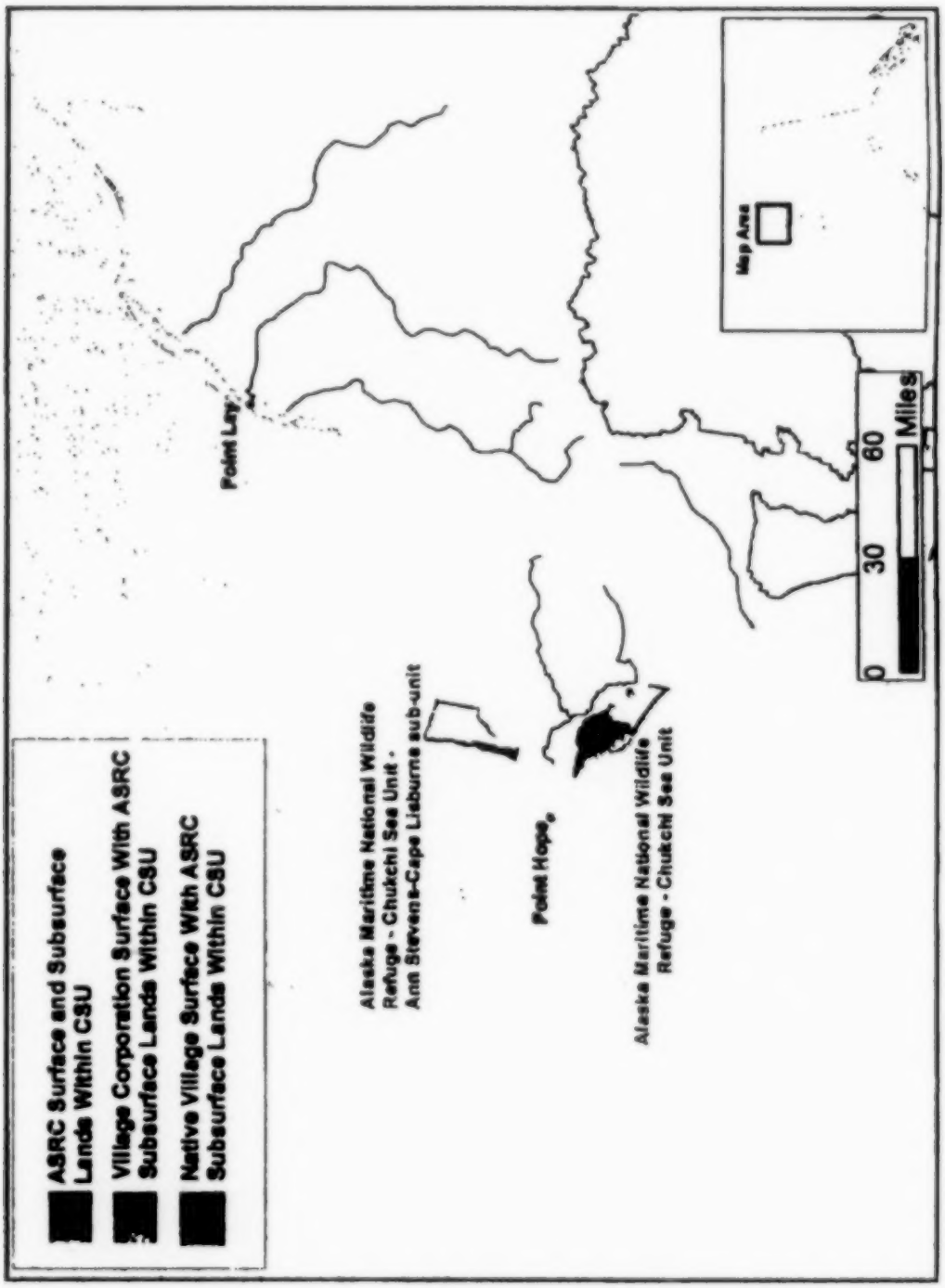
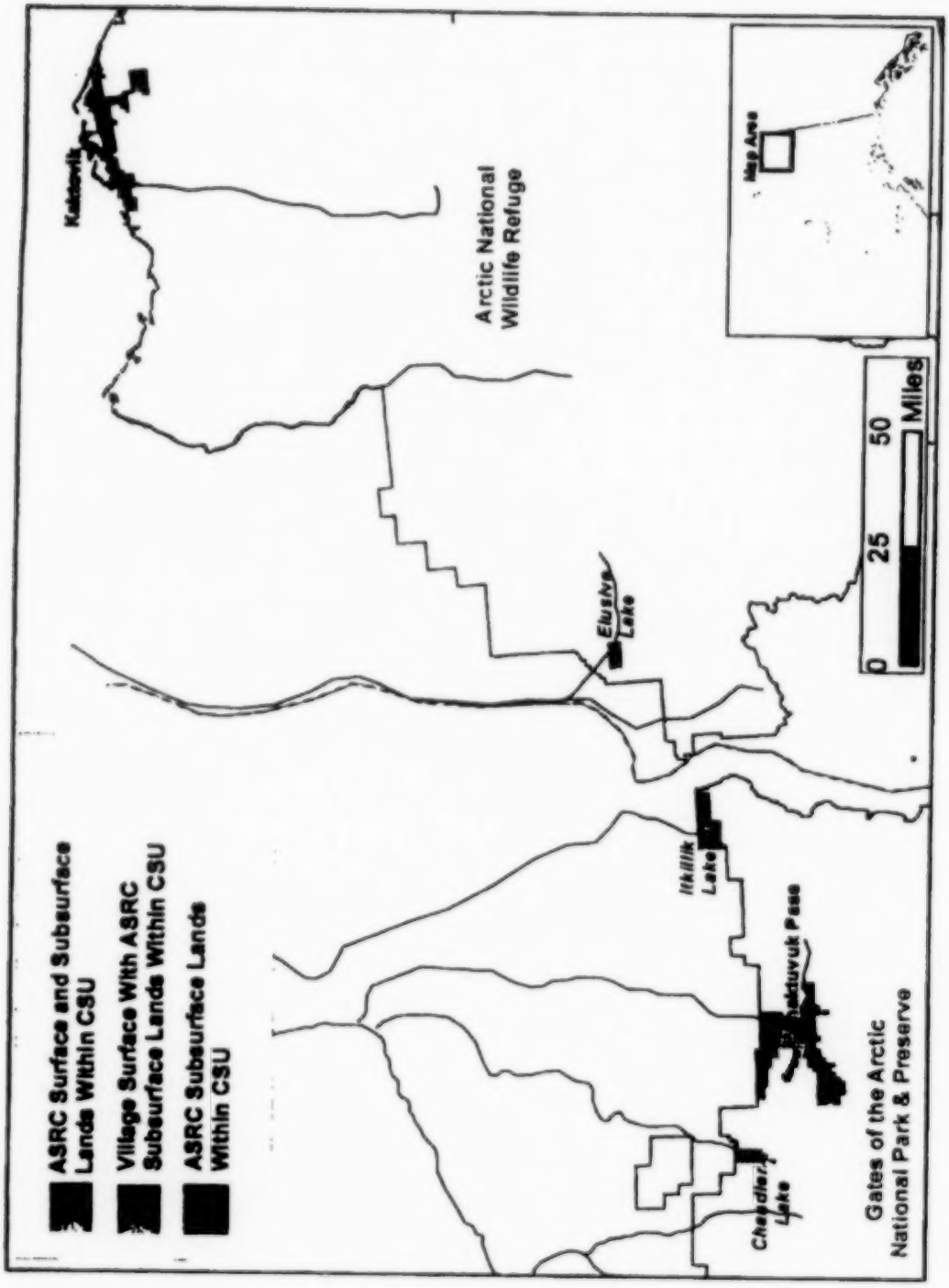
scheme on ASRC's inholdings within the refuge. Nevertheless, ASRC believes the meaning of section 103(c) of ANILCA has relevance to questions of federal regulatory authority on its privately owned lands within ANWR.


ASRC Surface and Subsurface Lands Within CSU
Village Corporation Surface With ASRC Subsurface Lands Within CSU
Native Village Surface With ASRC Subsurface Lands Within CSU
Point Lay
Alaska Maritime National Wildlife Refuge - Chukchi Sea Unit - Ann Stevens-Cape Lisburne sub-unit
Point Hope
Alaska Maritime National Wildlife Refuge - Chukchi Sea Unit
Map Area
0
30
60
Miles


ASRC Surface and Subsurface Lands Within CSU
Village Surface With ASRC Subsurface Lands Within CSU
ASRC Subsurface Lands Within CSU
Arctic National Wildlife Refuge
Kaktovik
Elusha Lake
Itkillik Lake
Chandler Lake
Gates of the Arctic National Park & Preserve
0
25
50
Miles

## II. This Case Presents an Important Federal Question Affecting ASRC and its Shareholders, Other Native Corporations, and the State of Alaska.

This Court should grant certiorari in this case because federal regulatory authority over State and privately held inholdings is an issue of tremendous economic and social importance across Alaska. Given oil and natural gas development possibilities on some of the affected State and Native-owned lands, the decision also has potential nationwide consequences. In addition, this Court should act because the Ninth Circuit interpreted section 103(c) in a way that exceeds Congress's Constitutional authority in many applications across most of the inholdings where the section applies.

### A. Enforcement of CSU regulations on ANCSA Corporation inholdings will dramatically impact economic development and day-to-day life on Native Corporation lands.

In national parks, human activity is intensely regulated for the purpose of protecting wildlife and the scenic wilderness character of the parks. Endless aspects of the use of the land are covered by the Code of Federal Regulations. According to the Ninth Circuit's reading of ANILCA, Congress intended that forty percent of private ANCSA lands would be subject to this vast regulatory scheme. Innumerable activities integral to economic and social life on inholdings

would fall within the regulatory ambit of the federal government.

The day-to-day consequences on private inholdings would be stunning. Buildings may not be constructed in national parks without advance approval from the federal government. 36 C.F.R. § 5.7. Hunting and fishing on park lands are subject to extensive restrictions and permitting requirements. *Id.* §§ 2.1(a)(1), 2.2, 2.3. Camping is limited to designated areas; levelling ground or altering a site to make it more suitable for camping is prohibited. *Id.* § 2.10. Even gathering berries requires written findings from a park superintendent. *Id.* § 2.1(c)(1).

Modes of transportation critical in rural Alaska, including snowmobiles, ATVs, watercraft, and even bicycles are all limited to locations approved by the park service. *Id.* §§ 1.4(a) (definitions of "vehicle" and "vessel"), 2.18, 3.8, 4.10, 4.30. Aircraft – another critical aspect of access to rural Alaska communities – may be used only in designated locations and by permit. *Id.* § 2.17. Commercial activities are circumscribed and regulated. *Id.* § 5.3. Research may be conducted only by specific institutions and agencies, and only under the regulatory watch of the park service. *Id.* § 2.5. Public meetings, demonstrations and distribution of printed materials all require permits and federal government oversight. *Id.* §§ 2.50, 2.51, 2.52.

The Ninth Circuit's ruling would prevent ANCSA shareholders from developing their lands for ecotourism, either in the form of lodges or even through

modest endeavors like providing basic trails, tent sites, and hiking permits to visitors. Indeed, buildings, trails, or roads of any kind could not be constructed on ANCSA inholdings, even in the villages themselves. Businesses in Native villages could be required to seek permits from federal agencies in order to do business.

The court's distinction between nationwide and Alaska-specific regulations, applying the former but not the latter on inholdings, leads to even more absurd results. Subsistence use is specifically permitted in many Alaska CSUs, including the use of subsistence cabins, *see, e.g.*, *id.* §§ 13.160, 13.410, but subsistence use is generally not allowed under the nationwide regulations. Applying the nationwide regulations on the inholdings, the National Park Service could forbid Native hunters from using their ATVs or snowmobiles to carry game back to the village. But on most Alaska National Parks themselves, less restrictive Alaska-specific park regulations often permit such travel. Under the nationwide regulations that the Ninth Circuit has applied on inholdings, camping is generally restricted to designated areas; in Alaska parks, it is generally allowed. *Compare id.* § 2.10 *with id.* § 13.25. Many more examples exist.

ANCSA lands were granted to Alaska's Native people so that they may freely live, work, and engage in subsistence activity and commerce there. And of course, part of Alaska's oil and other mineral wealth was specifically granted to ANCSA corporations in order to ensure the economic stability of Alaska's

Native people. Taking a vast federal regulatory regime aimed at public land conservation and enforcing it on private, ANCSA land undermines the purpose of ANCSA.

The government may argue that the National Park Service has no intention of stepping in to prohibit public meetings or commercial activity in villages like Anaktuvuk Pass. But the Ninth Circuit has ruled that in ANILCA, Congress granted federal agencies the authority to control all this and more on private land. The court's perversion of section 103(c) has wide ranging economic and social consequences for ASRC's shareholders, other ANCSA shareholders, and the rest of Alaska's people as well.

### B. Section 103(c) of ANILCA confirms that federal regulatory authority does not reach private and State land inholdings surrounded by federal conservation units.

The legal issue in this case is straightforward: did section 103(c) of ANILCA extend federal conservation regulations to State and private inholdings? The statutory text and the legislative history both unambiguously confirm that the Ninth Circuit answered this question incorrectly.

In enacting ANILCA in 1980, Congress was well aware of the pre-existing land ownership rights of the State, ANCSA Corporations, and private landowners. The Ninth Circuit recognized thirty years ago that

"after the [1971] passage of ANCSA, Congress became aware of the need for a legislative means of maintaining the proper balance between the designation of national conservation areas and the necessary disposition of public lands for more intensive private use." *City of Angoon v. Marsh*, 749 F.2d 1413, 1415-16 (9th Cir. 1984). Congress carefully balanced the conservation goals underlying the creation of new parks and refuges under ANILCA against the critical "economic and social needs of the people of Alaska." *Id.* Section 103(c) confirmed that State, Native Corporation, and other private lands would not be subject to the federal regulations applicable to the federal conservation lands:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. *No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units.* If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

16 U.S.C. § 3103(c) (emphasis added). The definition of "public lands" under the statute further clarifies

that CSUs include only "Federal lands," not State or Native Corporation lands. ANILCA § 102(3), 16 U.S.C. § 3102(3).

The Ninth Circuit misinterpreted ANILCA section 103(c) as a statutory expansion of federal power over private inholdings owned by the State and Native Corporations. Such power would not exist absent section 103(c). The statutory text makes clear that Congress instead intended the provision to confirm the *limit* on federal power.

The operative section 103(c) language states that "[n]o lands which . . . are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands ["Federal lands"] within such units." The Ninth Circuit read this sentence to mean that State, Native Corporation, and private lands are exempt "solely" from regulations "within such units," meaning Alaska CSU-specific regulations. And thus, by finding inholdings exempt from Alaska regulations but not nationwide regulations, the Ninth Circuit converted a power limiting statute into a new source of general federal regulatory authority over private land.

In *City of Angoon v. Marsh*, the Ninth Circuit had recognized that the language in section 103(c) "specifically indicat[es] that private lands are not to be restricted by virtue of their location within the boundaries of a conservation system unit." 749 F.2d at 1418 n.5. Section 103(c) was not included in ANILCA as a

clandestine extension of nationwide federal park regulations across State and Native Corporation lands. Instead, Congress included the word "solely" in section 103(c) to make clear that State and private inholdings are not exempt from federal statutes and regulations applicable to private and public lands everywhere. As ANILCA's legislative history makes clear, these include the Clean Air Act or the Clean Water Act and similar generally applicable legislation:

> Federal laws and regulations of general applicability to both private and public lands, such as the Clean Air Act, the Water Pollution Control Act, U.S. Army Corps of Engineers wetland regulations and other Federal statutes of general applicability would be applicable to private or non-Federal public land in holdings within conservations [sic] system units, and to such lands adjacent to conservation system units, and thus are unaffected by the passage of the bill.

S. Rep. No. 96-413, at 303 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5070, 5247.

In short, Mr. Sturgeon's reading of section 103(c) is correct. The plain meaning of the text, the legislative history, canons of statutory construction, and common sense all support his reading.

### C. No constitutional basis exists for the broad regulatory power the Ninth Circuit found in section 103(c) of ANILCA.

The Ninth Circuit read the operative language in ANILCA section 103(c) to expand the National Park Service's general regulatory power over lands owned by the State and Alaska Native Corporations. This interpretation exceeds Congress's Constitutional authority in many applications across most of the inholdings where the section applies. The holding thus squarely conflicts with this Court's statutory interpretation directive in *Clark v. Martinez*, 543 U.S. 371 (2005) and *United States v. Santos*, 553 U.S. 507 (2008).

The newfound regulatory authority must have a foundation in Congress's powers under the Constitution. Possible sources for such a power are the Property Clause and the Commerce Clause. But neither clause confers the breadth of legislative authority that would be required under the Ninth Circuit's interpretation.

The Property Clause is the source of broad regulatory power over federal lands, including conservation system units: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. Under the Property Clause, "[t]he power over the public land thus entrusted to Congress is without

limitations." *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (internal quotation marks omitted).

This Court has reiterated the "obvious" point that the "Property Clause is a grant of power only over federal property"; it does not generally reach private land. *Id.* at 538-39.[10] Although this Court has not considered the issue, some circuits have held that the Property Clause supports limited regulation of non-federal lands to the extent necessary to protect the federal lands.[11] But no court has held that the Property Clause supports general regulation of non-

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[10] *Accord Nevada v. Watkins*, 914 F.2d 1545, 1553 (9th Cir. 1990) (noting "that the Property Clause was inapplicable [to State-owned waterways], because that clause was limited to authority over the property belonging to the United States within [the States'] limits and did not apply to state-owned river beds." (citing *Kansas v. Colorado*, 206 U.S. 46, 89, 93 (1907) ("But clearly [the Property Clause] does not grant to Congress any legislative control over the states, and must so far as they are concerned, be limited to authority over the property belonging to the United States with their limits."))).

[11] *United States v. Lindsey*, 595 F.2d 5, 6 (9th Cir. 1979) (holding that the Property Clause "grants to the United States power to regulate conduct on non-federal land when reasonably necessary to protect adjacent federal property or navigable waters," and may require fire permits for campfires on State-owned riverbeds); *Free Enter. Canoe Renters Ass'n of Mo. v. Watt*, 711 F.2d 852, 855-56 (8th Cir. 1983) (upholding permit requirement for canoe rental business located on state or county lands to regulate how many canoes were used in Ozark National Scenic Riverways). For an example of such a regulation, *see* 36 C.F.R. § 2.13 (applying fire regulations to lands within park boundaries "regardless of land ownership" so long as the lands are "under the legislative jurisdiction of the United States.").

federal lands absent a showing that the regulation is necessary for the protection of federal lands. Congress has no Constitutional authority under the Property Clause to extend broad general regulations – or even narrow regulations unrelated to protection of federal lands – to State and Native Corporation lands.

Ducking this problem, the Ninth Circuit cited Congress's "pre-eminent authority" under the Commerce Clause to regulate "the flow of navigable waters," where John Sturgeon operated his hovercraft. *Sturgeon v. Masica*, 768 F.3d 1066, 1081 (9th Cir. 2014) (quoting *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 n.6 (1982)). But the Ninth Circuit had already rejected the argument that Congress exercised its commerce power in ANILCA to grant the federal government general regulatory authority over navigable waters in Alaska. *Alaska v. Babbitt*, 72 F.3d 698, 703 (9th Cir. 1995). And in any event, the Ninth Circuit's interpretation of ANILCA section 103(c) is not limited to navigable waters.

The Ninth Circuit interprets section 103(c) to grant federal regulatory power over all State, Native Corporation, and private lands and waters (both navigable and unnavigable) within the boundaries of CSU's in Alaska. The court ignored the unconstitutional results its reading of the statute creates. The ruling therefore ran afoul of this Court's clear direction: statutes must be interpreted to avoid unconstitutional results, and the same statutory text cannot mean one thing on navigable waters and something else entirely on other lands.

Mr. Sturgeon's constitutional arguments cannot be simply brushed aside by finding a Commerce Clause basis for reading the statute solely as applied to him. This Court made very clear in *Clark*, 543 U.S. at 381, that interpreting a statute differently in a facial versus an as-applied constitutional challenge "misconceives – and fundamentally so – the role played by the canon of constitutional avoidance in statutory interpretation." This Court has emphasized that "the meaning of words in a statute cannot change with the statute's application." *Santos*, 553 U.S. at 522 (citing *Clark*, 543 U.S. at 378).

Congress's use of the word "solely" in section 103(c) was not ambiguous. That word served to clarify that State and private inholdings are not exempt from broad federal regulations that apply to private lands everywhere. But to the extent ambiguity exists in section 103(c), the Ninth Circuit should have given "solely" "a limiting construction called for by one of the statute's applications, even though the other of the statute's applications, standing alone, would not support the same limitation." *Id.* In other words, even if hovercraft could constitutionally be excluded from the State's navigable waters, the Ninth Circuit was required to consider the absence of any constitutional basis for enforcing many general National Park Service regulations across inholdings. For example, the National Park Service regulates a broad array of activities including camping, gathering berries, public assembly and meetings, the leashing of pets, the construction of walking trails, and many others where

regulatory limitations would be unsupportable by Congress's commerce power.

To be clear, Congress potentially could extend certain categories of regulations related to interstate commerce to private inholdings. The issue before the Ninth Circuit in this case, however, was whether Congress actually intended to grant broad, general regulatory authority over inholdings. Section 103(c)'s language unambiguously clarifies that Congress had no such intent. And when it found ambiguity in the word "solely," the Ninth Circuit ignored this Court's direction that it must consider the wide array of unconstitutional results flowing from its preferred interpretation of section 103(c). Interpreting the statute in accordance with its plain meaning raises no constitutional concerns.

There is no reason for this Court to await another case involving federal government enforcement regulation on private inholdings, rather than State-owned navigable waters. Delaying decision of this issue would have important consequences for the people of Alaska. Because this is a statutory interpretation case, the Ninth Circuit's reading of section 103(c) now controls, and will have a powerful chilling effect on development and other activity on Native Corporations' inholdings. ASRC urges this Court to grant Mr. Sturgeon's petition and answer this important and straightforward statutory interpretation question now.

ASRC joins John Sturgeon, the State of Alaska, and other Alaska Native Corporation *amici* in urging this Court to grant Mr. Sturgeon's petition. Section 103(c) of ANILCA limits federal authority on non-federal inholdings, and there is no reason to wait to answer the question. No circuit split will ever arise on this issue. ANILCA affects only Alaska CSUs, and absent this Court's intervention, the Ninth Circuit will have the only word. This Court must step in to clarify that Native Corporations remain free to pursue development and subsistence activity – as well as ordinary day-to-day life in Native villages – without pervasive federal government regulatory intervention.

## CONCLUSION

For the foregoing reasons, ASRC urges this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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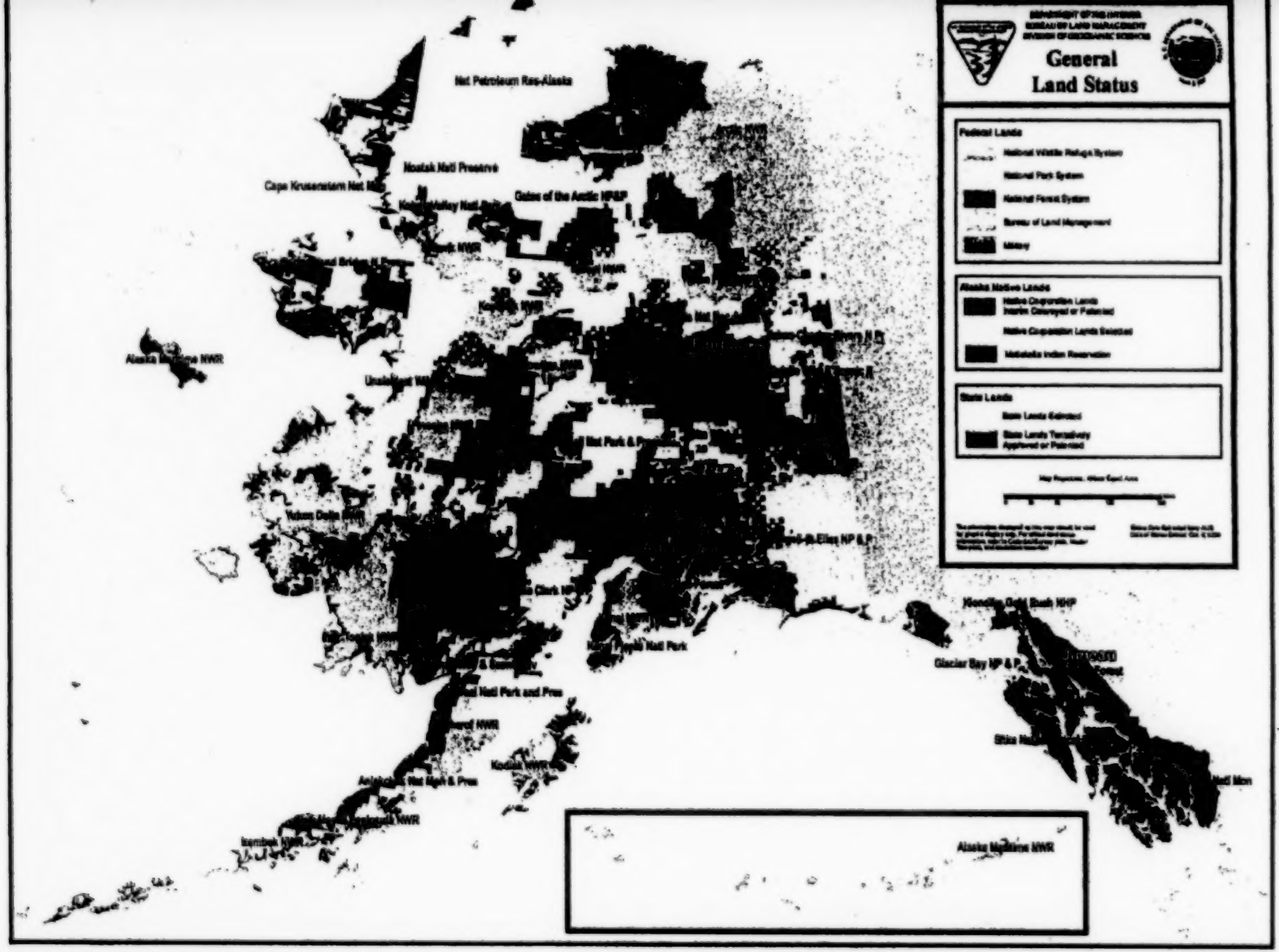
General
Land Status
Federal Lands
Alaska Native Lands
State Lands
Nat Petroleum Res-Alaska
Noatak Natl Preserve
Gates of the Arctic NP&P
Alaska Maritime NWR
Yukon Delta NWR
Glacier Bay NP & P
Alaska Maritime NWR